

On the other hand, claimant contends the Board lacks jurisdiction to review the November 21, 2008, Preliminary Decision and, therefore, the Board should dismiss this appeal. In the alternative, claimant requests the Board to affirm the Preliminary Decision.

The issues before the Board on this appeal are:

1. Does the Board have jurisdiction at this juncture of the claim to review the Preliminary Decision?
2. If so, is claimant's present need for cervical treatment related to an accidental injury or aggravation that arose out of and in the course of her employment with respondent?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds and concludes:

This is an appeal from a preliminary hearing order. The Board has jurisdiction to review decisions from a preliminary hearing in those cases where an administrative law judge has exceeded his or her jurisdiction.¹ In addition, K.S.A. 44-534a grants the Board jurisdiction to consider the following issues in appeals from preliminary hearing orders:

- (1) Whether the employee suffered an accidental injury;
- (2) Whether the injury arose out of and in the course of the employee's employment;
- (3) Whether notice is given or claim timely made;
- (4) Whether certain defenses apply.

In this instance, respondent and its insurance carrier argue that claimant has failed to prove her present need for medical treatment is the result of an injury or aggravation that arose out of and in the course of her employment with respondent. That is an issue the Board has jurisdiction to address at this juncture of the claim as it is, in essence, just another way of stating or raising the issue of whether claimant's neck injury arose out of and in the course of her employment with respondent. Thus, the Board has the authority to review the Judge's Preliminary Decision.

Claimant has been employed by respondent as an account representative since November 2006. Respondent provides credit card services for its clients. Claimant's job

¹ K.S.A. 2007 Supp. 44-551(i)(2)(A).

duties included receiving incoming phone calls and looking up information regarding customers' and clients' credit card accounts. As claimant was limited to a maximum of three minutes per phone call, she would handle up to 20 calls per hour in her eight-hour-per-day, 40-hour-per-week position.

Claimant worked in a cubicle and the information and protocol from the 14 different credit card companies she handled was kept tacked on the walls of her cubicle at shoulder level or above in several rows. While handling phone calls for respondent, claimant used a headset and she generally would not stand and walk to look at or remove client information from the walls while on calls because the cord attached to her phone would get tangled in her chair. Therefore, claimant regularly twisted and turned her head and body, raised her head, stretched and reached overhead to take down or replace the papers on the cubicle walls.

Claimant clarified or further testified on cross-examination regarding her job duties as follows:

Q. (Mr. Stubbs) So as we try and describe verbally what you would do, on occasion, you would be able to just see the codes from your chair as you twisted with your headset still on. On occasion, you would slide towards the wall, reach up, pull the two to five pages off, get what information you needed, and pin it back with a stick pin.

A. (Claimant) Correct.²

Before working for respondent claimant did not have any problems with her neck, shoulder or upper extremities. But over time the twisting, turning, and reaching caused pain in her neck and arms as well as headaches. Eventually, by the end of the workweek, claimant's symptoms would become almost unbearable.

After notifying respondent of the symptoms she was experiencing, respondent sent claimant for medical treatment. After receiving conservative treatment, which included an EMG and nerve conduction study of her upper extremities, claimant had carpal tunnel release surgery at her left wrist in April 2008 and the same surgery at her right wrist in May 2008, both performed by Dr. Keith Hodge. After the surgeries, claimant received physical therapy. And after completing the treatment for her hands, claimant worked for respondent part-time and continued to have problems – numbness in her hands; pain in her neck, arms and the middle of her back; and headaches. Claimant's work increased her symptoms dramatically.

² P.H. Trans. at 17, 18.

Claimant was eventually referred to Dr. Geoffrey L. Blatt with Midwest Neurosurgery Associates, who saw her on October 10, 2008. On that date, Dr. Blatt took claimant off work. Dr. Blatt also wrote Dr. Hodge on October 10, 2008, and noted the following:

Ms. Perry came to my office today at your kind request. As you are aware, she is a pleasant 43 year-old woman who first noticed some elbow pain at work. She works for GE Money [respondent] as a Customer Service Representative. She initially thought she had tennis elbow, but in talking with people at work they thought she might have carpal tunnel syndrome. As a result, she went ahead and made a worker's compensation claim, as carpal tunnel syndrome was an accepted claim for the type of work she does. She was worked up and did indeed undergo a bilateral carpal tunnel release, the first in April on the left and the second in May on the right. Some of her hand difficulties indeed improved, but she has continued to have worsening symptoms. In addition to the pain she was experiencing she has developed some neck and right shoulder pain. She has experienced pain radiating down both arms and numbness and tingling in the 1st and 2nd digits of her hands. . . .

. . . She had an MRI scan of her neck on 8/26/08 which shows disc herniations at C5-6 and C6-7 with resultant spinal stenosis partially due to a congenitally small canal in that region. . . .

. . . .

Based on her history, physical examination, and imaging studies, I believe that Ms. Perry does have cervical spinal stenosis with some probably right C6 radiculopathy associated with foraminal stenosis. While she may improve some with epidural steroid injections, I believe she will eventually undergo a C5-6 and C6-7 anterior cervical discectomy and fusion. In this particular case, I don't see any reason to attribute these findings to a work related injury³

Claimant was seen by Dr. Edward J. Prostic on November 12, 2008, at her attorney's request. Dr. Prostic noted claimant's recovery from her bilateral carpal tunnel syndrome had been impeded by her cervical spinal stenosis, that she may have improvement from epidural steroid injections and anti-depressant medicines, and that she will eventually require the surgery recommended by Dr. Blatt. In addition, Dr. Prostic concluded claimant had developed rotator cuff tendinitis in the left shoulder that might be improved with a subacromial steroid injection and strengthening exercises. In his November 12, 2008, letter to claimant's attorney, the doctor did not address whether claimant had injured or aggravated her neck working for respondent.

³ *Id.*, Resp. Ex. A at 1, 2.

An injured worker's testimony alone is sufficient evidence of his or her own physical condition.⁴

When an accident aggravates a preexisting condition, that injury is compensable under the Workers Compensation Act.⁵ Consequently, the test is not whether an accident *caused* an injury or condition but, instead, whether the accident *aggravated* or *accelerated* a preexisting condition.⁶

Claimant's testimony is credible that the work activities she performed for respondent caused the symptoms she is presently experiencing in her neck and down her arms. Accordingly, claimant has established that her work aggravated her neck and, therefore, she is entitled to receive workers compensation benefits for her neck condition. In conclusion, the November 21, 2008, Preliminary Decision should be affirmed.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁷ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2007 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

WHEREFORE, the undersigned Board Member affirms the November 21, 2008, Preliminary Decision entered by Judge Roberts.

IT IS SO ORDERED.

⁴ *Graff v. Trans World Airlines*, 267 Kan. 854, 864, 983 P.2d 258 (1999); *Hanson v. Logan U.S.D.* 326, 28 Kan. App. 2d 92, Syl. ¶ 2, 11 P.3d 1184 (2000), *rev. denied* 270 Kan. 898 (2001); *Cable v. Century Concrete, Inc.*, No. 1,027,595, 2007 WL 4661998 (Kan. WCAB Dec. 14, 2007); *Lee v. Larned State Hospital*, Nos. 241,965 & 242,026, 2003 WL 21396812 (Kan. WCAB May 23, 2003); *George v. Snip N Clip*, No. 256,500, 2002 WL 31602580 (Kan. WCAB Oct. 31, 2002).

⁵ *Odell v. Unified School District*, 206 Kan. 752, 481 P.2d 974 (1971).

⁶ *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, 949 P.2d 1149 (1997).

⁷ K.S.A. 44-534a.

Dated this ____ day of January, 2009.

KENTON D. WIRTH
BOARD MEMBER

c: Michael R. Wallace, Attorney for Claimant
Clifford K. Stubbs, Attorney for Respondent and its Insurance Carrier
Marcia L. Yates Roberts, Administrative Law Judge